No. 83- 1467

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARL VAINIO
Petitioner

V.

STATE OF MAINE
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES E. TIERNEY
Attorney General

ANITA M. ST.ONGE
Assistant Attorney General
Criminal Division
State House Station 6
Augusta, Maine 04333
(207)289- 2146
Counsel of record for
Respondent

WAYNE S. MOSS
Assistant Attorney General
of Counsel

QUESTION PRESENTED

I. WHETHER A DEFENDANT HAS THE RIGHT TO COLLATERALLY ATTACK THE VALIDITY OF THE UNDERLYING CONVICTION ON CONSTITUTIONAL GROUNDS AS A DEFENSE TO THE CHARGE OF POSSESSION OF A FIREARM BY A CRIMINAL DEFENDANT.

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OPINION BELOW

The opinion of the Supreme Judicial Court of Maine sitting as the Law Court affirming the conviction of the Petitioner is reported as State of Maine v. Carl Vainio, 466 A.2d 471 (Me. 1983).

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on October 5, 1983 (Pet. App. p. A-29). A motion for rehearing was denied by the Supreme Judicial Court on January 4, 1984 (Pet. App. p. A-30). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right....to have

the Assistance of Counsel for his defense.

Amendment XIV - Section 1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Maine Revised Statutes Annotated

R.S. ch. 132 § 1 (1954)

Whoever steals, takes and carries away, of the property of another, money, goods or chattels, or ...is guilty of larceny; and shall be punished, when the value of the property exceeds $100, by imprisonment for not less than 1 year nor more than 5 years; and when the value of the property does not exceed $100,... or by imprisonment for not more than 6 months....

15 M.R.S.A. § 392:

The penal provisions of section 393 shall not apply to any person employed as a law enforcement officer or employed by a watch, guard or patrol agency licensed under Title 32, chapter 89 or chapter 93. (Title 32, chapters 89 and 934 are not relevant to the determination of this case.)

15 M.R.S.A. § 393(1):

(1) Possession Prohibited.

No person who has been convicted of any crime, under the laws of the United States, the State of Maine or any other state, which is punishable by one year or more imprisonment or with the use of a dangerous weapon or of a firearm against a person, except for a violation of Title 12, chapter 319, subchapter III, shall own, have in his possession or under his control any

firearm, unless such a person has obtained a permit under this section. For the purposes of this subsection, a person shall be deemed to have been convicted upon the acceptance of a plea of guilty or nolo contendere or a verdict or finding of guilty by a court of competent jurisdiction.

15 M.R.S.A. § 393(2):

Application after 5 years. Any person subject to the provisions of subsection 1 may, after the expiration of 5 years from the date that the person is finally discharged from any and all sentences imposed as a result of the conviction, apply to the Commissioner of Public Safety for a permit to carry a firearm. Such a person shall not be issued a license to carry a concealed firearm or other weapon pursuant to Title 25, section 2031.

UNITED STATES CODE

18 U.S.C. § 1202(a):

Any person who--

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports

in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

STATEMENT OF THE CASE

In September, 1961, Carl Vainio, the Petitioner, was indicted by the Grand Jury in Piscataquis County for stealing brass pipes belonging to Guilford Woolen Mills, Inc. alleged to be of the value of one hundred ninety-two dollars and twenty cents ($192.20), a felony under R.S. ch. 132, § 1 (1954). At his arraignment in March, 1962, Vainio pleaded guilty to the charge and was sentenced to the Men's Reformatory. The execution of the sentence was suspended, however, and he was placed on probation for the period of two years. A special condition of probation consisted in making

restitution in the sum of ninety-six dollars and twenty cents ($96.20). Vainio entered his guilty plea to the alleged felony without the assistance of counsel, the printed record form indicating "Respondent inquired of if he wished Counsel, REPLY: No."

The record does show that Vainio was discharged from probation in March, 1964. That conviction has never been vacated, nor has the Petitioner ever been pardoned in connection therewith, nor did he obtain a permit from the Commissioner of Public Safety to possess or have under his control a firearm pursuant to 15 M.R.S.A. § 393.

On January 4, 1982, Vainio was indicted for having in his possession or under his control on or about December 31, 1981, a firearm, the accusation further charging that he had been convicted on March 16,

1962, of the crime of larceny, a felony under the laws of the State of Maine punishable by one year or more imprisonment, all in violation of 15 M.R.S.A. § 393. The evidence at trial did indicate, and Vainio did not deny, that on the alleged occasion he did have in his possession two firearms, a .357 Magnum and a .270 Browning rifle. Defense counsel at trial sought to attack the validity of Vainio's 1962 theft conviction, but the trial justice would not permit it.

On appeal, the Supreme Judicial Court of Maine rejected the Petitioner's contentions holding that the Petitioner was not entitled under the Constitution of either the United States or the State of Maine to collaterally attack the underlying conviction which serves as a basis for a firearm prosecution. State v. Vainio, 466

A.2d 471, 477 (Me. 1983).

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW IS CORRECT AND FOLLOWS THE PRINCIPLES SET FORTH IN LEWIS V. UNITED STATES, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed. 2d 198 (1980).

In Lewis v. United States, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980), this Court held that the federal gun laws prohibiting possession of firearms by persons who have been convicted of a felony focus not on the reliability but on the mere fact of conviction or indictment and are rationally related to the broad purpose of keeping firearms away from potentially dangerous persons. Lewis, 445 U.S. tat 67, 100 S.Ct. at 921-2, 63 L.Ed.2d at 210. The Court found that enforcement of that essentially civil disability through a criminal sanction does not support guilt or enhance punishment, thus distinguishing the

case for purposes of the Sixth Amendment right to counsel from those in which the court has allowed a collateral attack on an underlying uncounselled conviction, Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967); United States v. Tucker, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); Loper v. Beto, 405 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972) and Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979).

Petitioner argues that Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), not Lewis, should be applied to the facts of the case at bar. Petitioner's argument seems to be based upon three separate grounds. First, if the Petitioner would have been convicted of stealing goods in the amount of the restitution order imposed by the sentencing

judge, the Petitioner's prior conviction should have been a misdemeanor rather than a felony conviction and the court's holding in Baldasar requires that an uncounselled misdemeanor conviction cannot be used to satisfy an element of a subsequent offense. (Pet. Brief at 17-18) Second, the fact that the Petitioner was an illiterate minor at the time of his plea makes the prior conviction more unfair (Pet. Brief at 19); and finally, the Maine statute in question is sufficiently different from the Federal statute to make the holding in Lewis inapplicable. (Pet. Brief at 21-25)

Petitioner's first argument misses the point. The question is not whether the prior conviction is a misdemeanor or a felony, but how the prior conviction is used against the Petitioner in a subsequent

proceeding. The Petitioner admits that the crime he was convicted of is a separate offense and not a sentence-enhancing statute. (Pet. Brief at 18) It is for this very reason that the facts of Lewis and not Baldasar apply to this case. State v. Vainio, 466 A.2d 471, 476-477 (Me. 1983). See also Schindler v. Clerk of Circuit Court, 715 F.2d 341 (7th Cir. 1983); Smith v. State, 248 Ga. 828, 286 S.E.2d 709 (1982); State v. Novak, 107 Wis. 2d 31, 318 N.W. 2d 364 (1982); Rowland v. State, 161 Ga. App. 526, 289 S.E. 2d 15 (1982); State v. Ulibani, 96 N.M. 511, 632 P.2d 746 (1981); McClure v. Comonwealth, Va. 283 S.E. 2d 224 (1981).

In response to the Petitioner's second argument, regarding regarding the Petitioner's illiteracy and minority, Respondent submits these issues are

irrelevant. The holding of Lewis is that the Defendant may not collaterally attack his prior conviction. If the Court were to examine the alleged deficiencies of the first conviction, the Lewis decision would be meaningless. If the Petitioner wished to question the validity of this prior conviction, he could have done so through a direct appeal or post-conviction review. Furthermore, as was the case in Lewis, 445 U.S. at 64; 100 S.Ct. at 920, there is a way for the convicted felon to obtain relief prior to obtaining a firearm in that he can apply for a permit pursuant to 15 M.R.S.A. § 393(2).

The Petitioner's third argument, that the Maine statute differs from the Federal statute, making Lewis inapplicable, is also incorrect. While the Petitioner recognizes that the United State Supreme Court

traditionally defers to the State court of ultimate jurisdiction in determining the meaning of state statutes, (Pet. Brief at 22) Petitioner ignores the extensive discussion of Maine's gun control legislation by the Maine Supreme Judicial Court in State v. Vainio, supra at 474-475 and 478. The Court found that, when legislators updated existing gun control legislation in 1977, they concluded that "there was a demand for greater control of firearms in the hands of that class of persons who presented a high potential of danger to the public by reasons of their having been convicted of a felony or conduct which at the times was considered a serious offense." State v. Vainio, supra at 474. This would place the Maine Statute in exactly the same posture as the federal statute, making the logic and holding of Lewis applicable to the case at bar.

II. THE FACTS OF THIS CASE DO NOT PRESENT A REASON FOR REEVALUATING LEWIS.

The Petitioner urges this Court to reconsider its position and to overturn Lewis v. United States, supra. (Pet. Brief at 26-31). In support of his argument, the Petitioner cites a 1980 case note found in the Akron Law Review which criticizes the Court's decision in Lewis, claiming that the Lewis holding is in conflict with the holding in Baldasar v. Illinois, supra. (Pet. Brief at 28)

Additionally, Petitioner asserts that the distinction found by the Court in Lewis between its facts and the prior Sixth Amendment cases of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Burgett v. Texas, supra; United State v. Tucker, supra; and Loper v. Beto, supra, cannot withstand scrutiny. Citing

United States v. Panter, 688 F.2d 268 (5th Cir. 1982), Petitioner claims that the Lewis opinion does not offer final, clear and definite guidelines. (Pet. Brief at 30)

A review of several cases applying Lewis indicates that the courts have easily applied the principles of Lewis in light of Sixth Amendment challenges. Schindler v. Clerk of Circuit Court, 715 F.2d 341 (7th Cir. 1983); Smith v. State, 248 Ga. 828, 286 S.E.2d 709 (1982); State v. Novak, 107 Wis. 2d 31, 318 N.W. 2d 364 (1982); Rowland v. State, 161 Ga. App. 526, 289 S.E. 2d 15 (1982); State v. Ulibani, 96 N.M. 511, 632 P.2d 746 (1981); McClure v. Comonwealth, Va. 283 S.E. 2d 224 (1981)

Moreover, Respondent points out that this Court has re-affirmed its holding in Lewis subsequent to its decision in Baldasar in Dickerson v. New Banner

Institute, Inc., ___ U.S. ___, 103 S.Ct. 986, 74 L.Ed.2d 845 (1983) reh. den. ___ U.S. ____, 103 S.Ct. 1887, 75 L.Ed.2d 426 (1983). In that case, the Court considered whether an expunged conviction could be used as a basis for a firearm possession violation. Reviewing the Court's opinion that the language of the gun control statute was "sweeping", Justice Blackmun stated that the importance in Lewis was the presence or fact of the conviction. Dickerson, 103 S.Ct. at 991. The Petitioner presents no new facts which would require either a reevaluation of Lewis or a distinction between the instant case and Lewis. Respondent therefore, respectfully requests that this petition for a writ of certiorari be denied.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT WAS FILED OUT OF TIME UNDER U.S. SUP. CT. RULE 20.1.

Mr. Vainio's petition for a writ of certiorari should be denied because it was not filed within sixty days after the entry of the Maine Supreme Judicial Court's judgment in State of Maine v. Carl Vainio, 466 A.2d 471 (Me. 1983). U.S. Sup. Ct. Rule 20.1. The Maine Court's judgment was entered on October 5, 1983. Mr. Vainio's petition for a writ of certiorari was not filed with the Clerk of the United States Supreme Court, however, until March 2, 1984, one hundred and forty-nine (149) days after the entry of the Maine Court's judgment. The petition should therefore be denied.

Petitioner presumably tries to bring the filing of his petition within U.S. Sup. Ct. Rule 20.1's sixty-day filing period on the ground that the sixty days began to run on January 4, 1984, the day his petition

for rehearing was denied by the Maine Supreme Judicial Court, not October 5, 1983, the day of entry of the Maine Court's judgment. (Pet. Brief at 2).

Since Maine has no statute, no court rule, and in fact no authority for rehearing or reconsideration by the Maine Supreme Judicial Court of a judgment entered in a direct appeal, U.S. Sup. Ct. Rule 20.1's sixty-day filing period should be computed from the date that the Maine Court's judgment was entered October 5, 1983), not from the date that Petitioner's petition for a writ of certiorari was filed outside of Rule 20.1's sixty-day filing period and should therefore be denied.

CONCLUSON

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Dated: 5/1/84

ANITA M. ST.ONGE
Assistant Attorney General
Criminal Division
Appellate Section
State House Station #6
Augusta, Maine 04333
(207) 289-2146
Counsel of Record for
Respondent

CERTIFICATE OF SERVICE PURSANT TO U.S. SUP. CT. RULES 28.5(b) AND 35.7

I, Anita M. St.Onge, Counsel of Record for Respondent State of Maine and a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the State of Maine's "Brief in Opposition" to be served upon the

only other party to this proceeding, i.e., Petitioner Carl Vainio, by depositing said copies in a United States Post Office, wth first-class postage prepaid, addressed to Petitioner's Counsel of Record as follows:

James E. Mitchell, Esquire
86 Winthrop Street
Augusta, Maine 04330

Dated at Augusta, Maine, this 1st day of May, 1984.

ANITA M. ST.ONGE
Assistant Attorney General
Criminal Division
Appellate Section
State House Station #6
Augusta, Maine 04333
(207) 289-2146
Counsel of Record for
Respondent